

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

Case No. 00-3216-DHW
Chapter 13

EARLIE LEE DINKINS, JR.

Debtor.

EARLIE LEE DINKINS, JR.,

Plaintiff,

v.

Adv. Proc. No. 01-0278-DHW

JOSEPH R. HERRING;
RH ENTERPRISES, L.L.C.,
d/b/a PEDDLER FOOD STORES,

Defendants.

MEMORANDUM OPINION

Earlie Lee Dinkins commenced this adversary proceeding under 11 U.S.C. § 362(h) to recover damages from Joseph R. Herring and RH Enterprises for alleged willful violations of the automatic stay.

A trial on the complaint was held April 21, 2002. The court makes the following findings of fact.

Findings of Fact

Dinkins was a customer of Peddler Food Stores (hereinafter, "Peddler") where he maintained a charge account.¹ In mid 2000 Dinkins

¹ Peddler Food Stores is a trade name of the defendant RH Enterprises, LLC. Joseph Herring, co-defendant, is the general manager of Peddler Food Stores and has an interest in RH Enterprises, LLC.

owed a balance on the account of between \$3,000 and \$3,700.

Following a discussion with Peddler's management concerning his account, Dinkins gave Peddler a number of checks.² The parties agreed that Peddler would deposit one of these checks each week, crediting his account until the balance was paid in full.

Peddler negotiated at least two of the checks before Dinkins filed a chapter 13 bankruptcy petition on June 20, 2000 listing Peddler as a creditor. At that time, Peddler had five checks which had not been presented to Dinkins's bank for payment.

Before Dinkins filed the bankruptcy petition, his lawyer wrote a letter to Peddler advising that Dinkins would be filing bankruptcy and that Peddler should not cash the checks. Joseph P. Herring responded with a letter of his own which was undated but postmarked June 21, 2000.³ Therein, Herring informed Dinkins's lawyer that he intended, *inter alia*, to present the remaining checks for payment and initiate criminal charges against Dinkins if the checks were dishonored.

On June 21, 2000, Shelia Williams, an employee of Peddler, dated and deposited the remaining five checks.⁴ When Williams deposited the checks, she knew that Dinkins had filed for bankruptcy relief. All five checks were dishonored.

On September 29, 2000 a warrant issued for Dinkins's arrest. The warrant was predicated on the affidavit of Phillip Herring, a Peddler employee. Shortly thereafter, Dinkins was arrested and charged with five counts of negotiating a worthless check.

² Although the checks were undated, they were signed by Dinkins and made payable to Peddler in particular amounts.

³ See Plaintiff's Exhibit 1.

⁴ These checks are numbered 1721, 1722, 1723, 1724, and 1725; they total \$1,768.94. See Plaintiff's Exhibit 2.

There is little doubt that Dinkins entered into some arrangement with the District Attorney's office. There is, however, confusion as to what actually occurred. Dinkins does not remember even going to court on these five worthless check counts much less pleading guilty to all of the charged offenses. Certified court records⁵ reflect, however, that Dinkins plead guilty to the offenses on June 20, 2001. Further, there is some evidence that the District Attorney would nol pros the charges if the checks were repaid. Dinkins repaid \$1,768.94, the face amount of the worthless checks, to Peddler through the District Attorney's office.

Conclusions of Law

The debtor contends that Herring and Peddler willfully violated the automatic stay by instituting criminal proceedings against the debtor after the petition was filed. The court disagrees.

First, presenting the checks postpetition did not constitute a violation of the stay. The plain language of 11 U.S.C. § 362(b)(11) excepts presentment of a negotiable instrument and notice of dishonor from the operation of the automatic stay.⁶ *Roete v. Smith (In re Roete)*, 936 F.2d 963 (7th Cir. 1991); *Franklin v. Martin (In re Franklin)*, 254 B.R. 718 (Bankr. W.D. Tenn. 2000).

Second, the institution of criminal proceedings did not constitute a stay violation. The plain language of 11 U.S.C. § 362(b)(1) excepts "the commencement or continuation of a criminal action or proceeding against the debtor" from the operation of the automatic stay.

The debtor argues that the criminal proceeding was a mere subterfuge for the collection of the worthless check debt. However, the

⁵ Plaintiff's Exhibit 3.

⁶ The section "does not authorize any transfer of estate property, it merely permits the presenter's performance of an act that would otherwise be a stay violation." *Wittman v. State Farm Life Ins. Co. (In re Mills)*, 176 B.R. 924 (D. Kan. 1994) (quoting the lower court at *In re Mills*, 164 B.R. 663, 664-65 (Bankr. D. Kan. 1994)).

debtor could have raised that argument as a defense in the criminal proceeding. *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982). The district attorney "is in the best position to assess the merits of a criminal prosecution" under the worthless check act. *Piggly Wiggly No. 108, Inc. v. Dutton*, 601 So. 2d 907, 911 (Ala. 1992). "[I]t would be an unconstitutional exercise of power for district attorneys to undertake the prosecution of check writers for the purpose of debt collection." *Id.*

A bankruptcy court in the Eleventh Circuit has stated as follows:

Barnette leaves open the questions whether, and, if so, under what circumstances a creditor's participation in a criminal proceeding can constitute a violation of the § 362 stay. I would not believe any creditor who stated he had no interest in collecting the debt owed him. I assume in this case and in virtually every case, the creditor's primary motivation in provoking and assisting a criminal prosecution of a debtor in bankruptcy is to recover some of his loss. . . . I am equally convinced that such conduct despite such motivation is not a violation of the § 362 stay.

Kavoosi v. Russell (In re Kavoosi), 55 B.R. 120, 123 (Bankr. S.D. Fla. 1985).

By separate order, judgment will enter for the defendants.

Done this 22nd day of May, 2003.

/s/ Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Jerry C. Cruse, Attorney for Debtor
Debora E. Palmer, Attorney for Defendants